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No. 76-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CONSUMERS POWER COMPANY,
Petitioner,

v.

NELSON AESCHLIMAN, SAGINAW VALLEY NUCLEAR STUDY GROUP, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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Although the reasons which we believe warrant the grant of a writ are adequately stated in the petition, we believe a brief reply is warranted to correct several assertions contained in the Brief in Opposition filed by non-government respondents, and to comment on the position of the Federal respondents.

I

The assertions by the non-government respondents fall in three areas.

1. *The "energy conservation" issue.*

(a) The Brief in opposition states (p. 38): "The record plainly shows that the Licensing Board . . . *refused* to consider energy conservation issues on the ground that those issues were 'beyond our province.'" The statement grossly distorts the record.

The facts are stated in the careful and extensive consideration given to this issue by the Commission in its memorandum of January 24, 1974 (App. pp. 257-278), which, perhaps understandably, is nowhere mentioned in the Brief in Opposition. The Commission analyzed in detail what respondents—after the fact—characterized as "'energy conservation' contentions," and summarized its conclusions (App. p. 267):

> "Summarizing the analysis which follows, we find that Saginaw properly raised one related group of legitimate energy conservation issues which the Licensing Board allowed. Saginaw obliquely raised a second energy conservation issue essentially similar to the rate structure issue we allowed in *Niagara,* which the Board also allowed. The Board properly excluded several alleged energy conservation contentions concerning certain customer uses of electricity. Finally, several other contentions of Saginaw's allegedly precluded by the Board were in fact allowed, but they had nothing to do with energy conservation."

We again commend the full memorandum to the attention of the Court.

(b) Respondents suggest that the withdrawal by Consumers of an application for a construction license

for another nuclear plant in Michigan—the Quanicassee plant, which would have generated 2,300,000 additional kilowatts—demonstrates that there is no longer need for the electricity to be generated by the Midland plant. The non sequitur is, we hope, obvious. Moreover, in the amended proceedings to which respondents frequently make reference, prepared written testimony served by both Consumers and the NRC demonstrate the continuing need for the production of the Midland units.[1]

2. *The ACRS issue.* The court below concluded that the reference by the Advisory Committee on Reactor Safeguards to "other problems" made its report fatally ambiguous and required a remand (App. pp. 16-18). The Petition, *inter alia,* pointed out that the court had overlooked the fact that respondent Saginaw itself introduced in evidence a letter from the Committee itemizing the "other problems" and explaining their resolution. The Brief in Opposition now asserts (p. 32) that because the letter was issued on December 18, 1972, after the Licensing Board hearings had been concluded, they were denied "any opportunity to contravene the ACRS conclusions." Respondents fail to mention, however, that the adequacy of the December 18 letter was expressly raised by respondents at the hearing before the Appeal Board—although respondents then did not seek to contravene the Committee's conclusions, as they now say they want an opportunity to do. The matter was carefully considered by the Appeal Board, and the conclusion reached that re-

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[1] Respondents have stated that they will file no written direct testimony. Letter to the Board dated November 5, 1976, Dockets 50-329, 50-330.

spondents had not justified a reopening of the Licensing Board proceedings (App. pp. 230-231).

3. *The Dow Contract issue.* The Brief in Opposition seeks to make much of alleged changes in the contractual arrangements between Consumers and Dow Chemical Company (Br. in Opp., pp. 11-13, 19-21), as if it were a new issue. The facts are that while the appeal was pending in the court below, these respondents moved the Commission to reopen the proceedings because of alleged significant changes in Dow's commitment to take process steam and electric power from the Midland plant (App. p. 5, n. 4). The matter was investigated by the Commission, and two Memoranda and Orders were issued (App. pp. 281-284). The Commission concluded (App. p. 284):

> "We have carefully reviewed the relevant portions of these contracts and reaffirm our prior determination that there are no 'changed circumstances', as alleged by Saginaw, warranting a reopening of these proceedings. We think it sufficient to note that Dow has a contractual commitment to purchase large quantities of process steam from the completed facility, that substantial purchases of electricity are also contemplated, and that Dow's existing fossil-fueled facilities are to be maintained primarily on a stand-by basis."

The court below did not disagree. Its only comment was that whatever changes had occurred in the Dow arrangements should be considered in the new cost-benefit analysis which it had already decreed (App. p. 21):

> "As this matter requires remand and reopening of the issues of energy conservation alternatives as well as recalculation of costs and benefits, we assume that the Commission will take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fuel generating facilities."

However, it is true that the decision by the court below, unless corrected by this Court, itself poses a threat to the continuation of the Consumer—Dow arrangement. It is appropriate to point out that, in response to a request by the re-convened Licensing Board on September 21, 1976, as to how long the hearing on the issues remanded by the court below would take, respondents stated their estimate of two years or more (Letters of September 27 and October 3, 1976).

The prospect of such further inordinate delay—Consumers initial application to the Commission was filed in 1969— would, of course, contribute to the possibility of a further change in the Consumer—Dow relationship. Prepared testimony discloses that an additional review was commenced in August 1976 as a direct result of the Court of Appeals decision here involved. The memorandum referred to by the respondents (Br. in Opp. pp. 20-21) was part of such review and represents the personal views of one official. However, that same official testified (prepared testimony of Joseph G. Temple, pp. 2-3, follows Tr. 220) that the review—

> "resulted in conclusion that at the present time circumstances have not changed sufficiently to call for a modification of Dow's commitment to nuclear produced steam to be supplied by Consumers Power in March of 1982. Under the present circumstances as known to Dow, the nuclear alternative remains the most attractive one economically. Further, the matter will be kept under continuous review and Dow will keep all of its options open."

II

What has just been said is also relevant to the position taken by the United States in the brief filed by the Federal respondents. The United States views with equanimity the prospect of additional years of administrative hearings, and additional months or years for a new judicial review, in order to be persuaded that there is a "ripe" issue (Br. p. 10). The Commission, and Consumers, rightly reject that view. Decent administration of an important regulatory system deserves better than that.

We need not now repeat the arguments made in the petition as to the need to dispose of a matter that has already been pending for eight years. Nor should it be necessary to do more than state the obvious fact that while the United States has persuaded itself that the decision below says no more than that the record made by the Commission was inadequate, that conclusion will not prevent litigants in other Commission and other administrative review proceedings from urging a different and far greater significance to what the court below has said—a significance that would only be underscored by a denial of certiorari. Only a decision by this Court, not an assertion in a brief, can resolve the issue.

We note the agreement by the United States with the position of the Commission, and of Consumers, that the court below erred in its decision with respect to the ACRS report (Br. p. 13) and its failure to disagree with the Commission and Consumers as to the error of the court below with respect to energy conservation (Br. p. 12). We believe, therefore, that a review by this Court now will dispose of all issues and will

permit a project in which large sums have already been invested to proceed to completion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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